

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-678

EXECUTIVE JET AVIATION, INC., ET AL., *Petitioners*

— v. —

CITY OF CLEVELAND, OHIO, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Chronological List of Relevant Docket Entries

June 16, 1969—Plaintiffs Executive Jet Aviation, Inc. and Executive Jet Sales, Inc.'s¹ complaint filed in United States District Court for the Northern District of Ohio, Eastern Division.

July 24, 1969—Defendant Dicken's answer filed.

July 30, 1969—Defendants City of Cleveland and Phillip A. Schwenz's² answer filed.

July 30, 1969—The City's third-party complaint filed.

Aug. 19, 1969—EJA's answers to interrogatories of the City filed.

Jan. 22, 1970—The City's motion to dismiss filed.

Jan. 27, 1970—Third-Party Defendant United States of America's answer to the City's third-party complaint filed.

Feb. 17, 1970—Defendant Dicken's motion to dismiss filed.

Mar. 4, 1970—Deposition of Edward J. McAvoy filed.

June 12, 1970—Order and memorandum of district court entered dismissing complaint for lack of jurisdiction and dismissing third-party action.

July 10, 1970—EJA's notice of appeal filed.

Aug. 24, 1971—Opinion and judgment of the Court of Appeals for the Sixth Circuit.

Dec. 16, 1971—EJA's petition for rehearing denied.

Feb. 22, 1972—Petition for certiorari granted.

¹ Hereinafter referred to collectively as "EJA."

² Hereinafter referred to collectively as "the City."

Complaint

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed June 16, 1969]

Civil Action No. C69-464

**EXECUTIVE JET AVIATION, INC. and EXECUTIVE JET SALES,
INC., Plaintiffs**

v.

**CITY OF CLEVELAND, OHIO, East 6th and Lakeside Avenue,
Cleveland, Ohio**

**PHILLIP A. SCHWENZ, 724 Sandlewood,
Elyria, Ohio**

- and -

**HOWARD E. DICKEN, 23225 Cedar Point Road,
Cleveland, Ohio, Defendants**

1. This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears.

2. At all times herein mentioned plaintiff Executive Jet Sales, Inc., was the owner of a Falcon Mystere 20 jet aircraft Registration No. N367EJ (hereafter the Falcon), and plaintiff Executive Jet Aviation, Inc. (hereafter EJA) was the operator in lawful possession of the Falcon.

3. At all times herein mentioned defendant City of Cleveland, Ohio (hereafter the city) was and is a municipal corporation organized and existing under the laws of the State of Ohio. At all times herein mentioned the city owned, operated, controlled and maintained the Burke Lakefront Airport, Cleveland, Ohio (hereafter the airport), as a municipal airport for use by the public; and operated the airport for revenue and profit as a proprietary function receiving fees from the users of the airport, including plaintiffs.

4. At all times herein mentioned defendant Phillip A. Schwenz was employed by the city as airport manager of the airport, and at all times herein mentioned was acting in the scope and course of that employment as a servant, agent and employee of the city. At all times herein mentioned the city acted by and through its servants, agents and employees, including Phillip A. Schwenz, who were at all times herein mentioned acting within the scope and course of their employment and on behalf of the city.

5. At all times herein mentioned defendant Howard E. Dicken was employed by the United States Federal Aviation Administration (hereafter FAA) as an Air Traffic Control Specialist and was on duty in that capacity at the airport. At all times herein mentioned defendant Howard E. Dicken was acting within the scope and course of that employment and was a person acting under an officer of the United States or an agency thereof and was acting under color of such office.

6. On July 28, 1968, plaintiffs' Falcon aircraft taxied on and took off from the airport, all under the direct supervision and control of one or more of the defendants. On said date defendant Howard E. Dicken cleared the Falcon for takeoff from the airport.

7. On or about July 28, 1968, defendant Howard E. Dicken negligently and carelessly supervised and controlled, or failed to supervise and control, plaintiffs' Falcon; and negligently and carelessly failed to warn plaintiffs of hazards to aircraft existing on, over and adjacent to the airport of which defendant Howard E. Dicken knew or should have known, including a huge flock of seagulls which were sitting on the active runway of the airport at the time defendant Howard E. Dicken cleared plaintiffs' Falcon for takeoff from said runway.

8. On and before July 28, 1968, the city and defendant Phillip A. Schwenz, and each of them, negligently and care-

lessly operated, controlled, maintained, supervised and inspected the airport; negligently and carelessly failed to remove and eliminate hazards to aircraft existing on, over and adjacent to the airport, including the aforementioned flock of seagulls; and negligently failed to warn plaintiffs of hazards to aircraft existing on, over and adjacent to the airport of which the city and defendant Phillip A. Schwenz knew or should have known, including the aforementioned flock of seagulls.

9. As a result of the aforesaid negligence and carelessness of defendants, and each of them, plaintiffs' Falcon struck several hundred seagulls shortly after takeoff from the airport when the flock flushed; and the Falcon was totally destroyed when it crashed and sank in the navigable waters of Lake Erie off shore from the airport, all to plaintiffs' damage in the sum of One million, five hundred fifty thousand dollars (\$1,550,000.00).

10. As a further result of this negligence and carelessness plaintiffs were deprived of the use of the Falcon for the period reasonably required to obtain a replacement aircraft, the reasonable rental value for this period being Two hundred thousand dollars (\$200,000.00).

11. As a further result of this negligence and carelessness, plaintiffs incurred salvage, raising and other costs in the sum of Thirteen thousand, six hundred forty-three dollars and 64 cents (\$13,643.64).

WHEREFORE, plaintiffs demand judgment against the defendants, or one or more of them, in the sum of One million, seven hundred sixty-three thousand, six hundred forty-three dollars and 64 cents (\$1,763,643.64), with interest thereon as provided by law, for the costs of this action and for all other proper relief.

[Signatures omitted in printing]

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Answer of Defendant Howard E. Dicken

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Title omitted in printing]

[Filed July 24, 1969]

Defendant, HOWARD E. DICKEN, by his attorney, BERNARD J. STUPLINSKI, United States Attorney for the Northern District of Ohio, answering the plaintiffs' complaint, alleges as follows:

1. The allegations contained in paragraph "1" of the complaint present questions of law, which are respectfully referred to the court for determination.

2. It is without any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "2", "3", "4" and "8" of the complaint.

3. In response to paragraph "5" of the complaint, admits that at all times mentioned herein this defendant was employed by the United States of America, through the Federal Aviation Administration, in the capacity of an air traffic controller and was at the time in question acting in the scope of his employment as such air traffic controller and except as above-admitted, denies each and every other allegation contained in said paragraph.

4. In response to paragraph "6" of the complaint admits that this defendant issued an air traffic clearance for take-off to aircraft No. N367EJ and except as above-admitted, denies each and every allegation contained in said paragraph.

5. Denies each and every allegation contained in paragraphs "7", "9", "10" and "11" of the complaint.

FIRST DEFENSE

6. That the negligence of the pilot of plaintiffs' aircraft caused or contributed to the accident and the damages sued for herein.

SECOND DEFENSE

7. That the complaint fails to state a claim upon which relief can be granted against this defendant.

THIRD DEFENSE

8. That plaintiffs are not the real party in interest.

FOURTH DEFENSE

9. That the provisions of 28 U.S. Code 2680(a) are applicable to this defendant.

FIFTH DEFENSE

10. That the provisions of 28 U.S. Code 2680(h) are applicable to this defendant.

SIXTH DEFENSE

11. That the flight of plaintiffs' aircraft was made in connection with, subject to and with acceptance of the known risks and perils of the air through which said aircraft travelled, and acts of God, over all of which this defendant had no control; and by undertaking said flight, plaintiffs, through their agents, servants or employees, assumed, accepted, and undertook all said risks and dangers, which were obvious and well-known or which should have been obvious and well-known to them and said accident and damages arose out of and resulted from said risks and damages and acts of God.

WHEREFORE, defendant, Howard E. Dicken, respectfully requests judgment in his favor, dismissing the plaintiffs' complaint, together with the costs and disbursements applicable under law, and such other, further and different relief as to the court may seem just and proper.

[Signatures and Certificate of Service
Omitted in Printing]

**Answer of Defendants
City of Cleveland and Phillip A. Schwenz**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Title omitted in printing]

[Filed July 30, 1969]

Now come defendants City of Cleveland (hereinafter "Cleveland") and Phillip A. Schwenz (hereinafter "Schwenz"), and for their joint answer to the complaint, state as follows:

FIRST DEFENSE

1. These defendants deny the allegation of paragraph 1 of the complaint.

2. These defendants have no knowledge or information sufficient to form a belief with respect to the allegations of paragraph 2 of the complaint, and hence deny each and all said allegations for want of knowledge.

3. These defendants admit that at all times mentioned in the complaint Cleveland was and is a municipal corporation organized and existing under the laws of the State of Ohio; that Cleveland owned, operated and maintained the Burke Lakefront Airport, Cleveland, Ohio (hereinafter the "Airport"), as a municipal airport for use by the public, and that it charged fees to persons who used the Airport to cover in part the expense of its operation. These defendants deny that they controlled the Airport, and say that ground traffic at the Airport as well as air traffic in the vicinity thereof including all take-offs and landings were controlled by representatives of the Federal Aviation Administration (hereinafter "FAA") located in the control tower of the Airport. On July 28, 1968 one of the FAA representatives in the control tower of the Airport was defendant Howard E. Dicken.

4. These defendants admit that at all times mentioned in the complaint, Schwenz was employed by Cleveland as manager of the Airport and was acting in the course and scope of such employment.

5. These defendants admit the allegations of paragraph 5 of the complaint.

6. These defendants admit that on July 28, 1968 a Falcon aircraft bearing registration number N367EJ (hereinafter the "Falcon") taxied and attempted to take off from the Airport, and that defendant Dicken cleared that aircraft for such take-off, but defendants deny that the Falcon was ever under any supervision or control, direct or otherwise, of Cleveland or Schwenz. On the contrary, the Falcon was at all times under the direct and immediate supervision and control of William P. Flower and Charles E. Dirck, its pilots, who were then and there acting as employees of plaintiffs within the course and scope of such employment.

7. These defendants deny that defendant Dicken failed to warn the said pilots of the Falcon concerning the presence of a large flock of seagulls which were then sitting on one of the runways of the Airport designated as runway 6L. Defendants say that the said pilots were fully aware of the presence and the position of said birds on runway 6L and nevertheless elected to attempt their take-off from that runway although another suitable runway free of such seagulls was available for their use.

8. These defendants deny each and all of the allegations contained in paragraph 8 of the complaint, and say that the presence of seagulls on runway 6L on July 28, 1968 was caused by weather conditions over which these defendants had no control; that defendants attempted on several occasions on said date to frighten said seagulls away from the Airport, but that all such attempts were unsuccessful and that there are no effective means which these

defendants may legally employ which will clear the runways of the Airport of seagulls during certain weather conditions. Defendants further say that for a substantial period of time prior to the attempted take-off of the Falcon on July 28, 1968, warnings of the presence of said seagulls on runway 6L at the Airport were sent out by teletype and were posted on the Notam Board in the operations office of the Airport, which warning was or should have been observed by the pilots of the Falcon before they boarded that aircraft on said date. Further warnings concerning the presence and position of the seagulls on runway 6L were given to said pilots of the Falcon by radio before they attempted to take off on that runway; and the presence and position of the seagulls on that runway were clearly visible to said pilots before they commenced their take-off on July 28, 1968.

9. These defendants admit that while attempting a take-off on runway 6L at the Airport on July 28, 1968, the Falcon struck a number of seagulls as the result of which the take-off was aborted and the Falcon sustained certain damage in the resulting crash, but defendants deny that the Falcon was totally destroyed, deny that it sank in the navigable waters of Lake Erie and deny that said aircraft was damaged in the manner or to the extent alleged by plaintiffs in their complaint.

10. These defendants deny the allegations of paragraph 10 of the complaint.

11. These defendants deny the allegations of paragraph 11 of the complaint.

12. These defendants deny each and all of the allegations against them in the complaint contained, save and except such as are herein expressly admitted to be true, to the same extent and with the same effect as though each such allegation were herein set forth at length and herein categorically denied.

SECOND DEFENSE

13. For their second defense, these defendants adopt and incorporate herein as though fully rewritten herein at length each and every one of the allegations, admissions and denials contained in the foregoing first defense, paragraphs 1 through 12, and further state:

14. The pilots of the Falcon, acting in the course and scope of their employment by plaintiffs, knew or in the exercise of ordinary care and prudence should have known of the presence of a large flock of seagulls on runway 6L at the Airport at the time they commenced their attempted take-off on said runway on July 28, 1968.

15. Plaintiffs were careless and negligent in the following respects and particulars which directly and proximately caused the crash of the Falcon at the time and place aforesaid:

- (a) Plaintiffs were negligent in failing to heed the warnings given to their pilots concerning the presence of seagulls on runway 6L at the Airport on July 28, 1968.
- (b) Plaintiffs were negligent in failing to use runway 6R for their take-off at the time and place aforesaid, which runway was free of seagulls.
- (c) Plaintiffs were negligent in attempting to take off from runway 6L at the Airport with full knowledge and appreciation of the hazard to such take-off from the large flock of seagulls on said runway.

16. The aforesaid negligent acts and omissions by plaintiffs were the direct and proximate, primary and active cause of the crash of the Falcon at the Airport on July 28, 1968 and of such damage to and reduction in value of that aircraft, loss of its use and salvage expense as may

have occurred as a result of that crash, by reason whereof plaintiffs are barred and prevented from any recovery herein against these defendants.

THIRD DEFENSE

17. For their third defense, these defendants adopt and incorporate herein as though fully rewritten herein at length each and every one of the allegations, admissions and denials contained in the foregoing first and second defenses, paragraphs 1 through 16, and further state:

18. Prior to the time they commenced the take-off of the Falcon at the Airport on July 28, 1968, plaintiffs knew of the presence and position of the large flock of seagulls on runway 6L. Nevertheless plaintiffs voluntarily commenced and continued the take-off of the Falcon on that runway with full knowledge and appreciation of the hazards to the take-off caused by the presence of said seagulls although runway 6R was free of such seagulls and was available for use by plaintiffs in said take-off. Plaintiffs willingly and knowingly exposed themselves and the Falcon to such hazards and perils as arose by reason of attempting a take-off under such circumstances and hence plaintiffs assumed all the risks resulting from the presence of said seagulls including the risk of damage to and reduction in value of the Falcon, the loss of its use and salvage expense, which assumption of the risk by plaintiffs bars and prevents their recovering against these defendants herein.

FOURTH DEFENSE

19. For the fourth defense, these defendants adopt and incorporate herein as though fully rewritten herein at length each and every one of the allegations, admissions and denials contained in the foregoing first, second and third defenses, paragraphs 1 through 18.

20. The FAA cleared the Falcon for take-off on runway 6L at the Airport on July 28, 1968. If it should be found herein that the FAA cleared the Falcon for such take-off without warning its pilots of the presence and position of the large flock of seagulls on said runway, which failure to warn is expressly denied, then the issuance of such take-off clearance without giving warning of the presence and position of said seagulls constitutes a separate, independent, intervening cause of the crash of the Falcon which could not have been foreseen by these answering defendants, by reason whereof these defendants are not liable to plaintiffs for any damage to or reduction in value of the aircraft or for its loss of use or salvage expense which may be found to have been sustained as a result of the crash.

FIFTH DEFENSE

21. These defendants are informed and believe that plaintiffs have been indemnified by their insurance carrier or carriers for such loss as they may have sustained as a result of the crash of the Falcon at the Airport on July 28, 1968.

22. This action is not brought or prosecuted in the name of the real party in interest as required by Rule 17(a) of the Federal Rules of Civil Procedure.

WHEREFORE, having fully answered, defendants Cleveland and Schwenz pray that the complaint be dismissed with prejudice as to them and that they may have judgment herein on the complaint and for their costs herein.

[Signatures and Certificate of Service
Omitted in Printing]

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**Exhibit A to Plaintiffs' Answers to Interrogatories of
Defendant City of Cleveland**

STATEMENT OF WITNESS

[Filed August 19, 1969]

July 30, 1968

Pilot Statement: W. P. Flower, P/C
C. Dirck, C/P

The Aircraft—EJ367—arrived at Burke Lakefront July 26 approximately 1600 hours. It was immediately refueled by Remmert-Werner, secured and the crew departed to the motel. The crew consisted of W. P. Flower, P/C, C. Dirck, C/P, and Miss J. Vargo, Hostess.

On the 28th at approximately 1000 hours, the crew arrived at Lakefront for a ferry flight to Portland, Maine, picking up passengers and continuing to White Plains, N.Y. The aircraft was uncovered and preflighted by the First officer. The Hostess made a final inspection of the cabin in preparation for picking up passengers and the Captain obtained the weather, filed a flight plan, and obtained a release from the Company dispatcher. After engine start we received clearance to taxi to Runway 6 Left. As the flight was non-revenue it is company policy for the first officer to fly in the left seat for proficiency and training. The first officer was flying from the left seat, the captain in the right seat, and the Hostess was seated in the first seat on the right side facing aft.

The check list was completed and on taxiing out, it was noted that one aircraft was on landing rollout on 6 Left, and ground advised an aircraft was on the approach to 6 Right. The ground advised to expedite across 6 Right. At this point there were, to my knowledge, no advisories regarding birds from ground control. In obtaining the weather by phone for Cleveland, Portland, and White Plains, there was no information given regarding birds as

would appear on the end of the Cleveland sequence. On instructions, the pilot in the right seat, switched to power frequency, and requested take-off. The take-off clearance initially was faded with the final portion of the statement saying something to the effect "Caution, birds *on end of runway.*" These exact remarks can be substantiated by the tower tape. The bird caution to me was a routine advisory as would be given for a few or small number of birds. The transmission did not possess extreme hazard information. As the take-off clearance was not clear a second request was made and a second clearance was issued for take-off. Neither pilot could see the birds on the end of the runway. After clearance to take-off was received the pilot in the left seat executed the take-off and rotated at approximately 125 Kts. The pilot in the right seat made a power check, voiced 30 Kts, 100 Kts., V1 and rotate. The pilot in the left seat could not distinguish the bird line prior to rotation and in his estimation could not abort the take-off. On rotating a sea of birds on the runway became visible. Approaching the birds at approximately 75 feet caused them to flush and fly into the aircraft, apparently hundreds hitting the belly and engine intakes. Bird impact substantially reduced the air speed an estimated 15 or 20 Kts. The pilot in the left seat raised the gear handle, the pilot in the right seat maneuvered the throttles in an effort to obtain partial power. There was almost immediate total loss of power. The engine temperature indicated above 850 degrees on both engines and the RPM dropped rapidly below 70%. The aircraft flew in a semi-stalled attitude stall horn blowing until contacting the water. The aircraft struck the top of a pick-up truck and a portion of the airport perimeter fence. The aircraft contacted the water in a flat attitude and on a second impact water entered the cabin almost immediately. Only a few seconds passed between bird impact and water contact and it is estimated that the aircraft did not attain more than 75 to 100 feet in altitude. After the second impact the pilot went to the rear of the

aircraft to release the emergency exit and see if the stewardess was uninjured. The airplane settling in the water apparently exerted some pressure inside and it was impossible to open the right cabin emergency exit. One pilot succeeded in opening the pilot's left window with the fire extinguisher. The other pilot opened the left cabin exit. A small private boat picked up the crew as the aircraft was settling in the water. Approximately the nose cone area remained above the water level. The crew returned to the airport and there were no injuries. The aircraft floated approximately 5 to 10 minutes. No bird dispersing method or system of any kind exists at the airport.

In conclusion, the advisory comment "birds on end of runway," "bird activity" is a caution remark and denoted no extreme hazard to the crew. It has been given routinely to hundreds of departing pilots at Lakefront. The mass of birds that must have been on the runway that would allow an aircraft to strike 314 birds to me denotes an extreme hazard. When an aircraft is cleared to take-off, the pilot has every right to assume that there are no other aircraft on the runway, that there are no people on that runway or that there are not one thousand birds on the runway. In my estimation the runway should have been closed for departing jet traffic. With that many birds, the runway could never have been considered safe. It would have been helpful if some official survival assistance could have been available from the airport. The Coast Guard apparently does not have direct contact with the tower and it was sometime before they arrived at the submerged aircraft.

/s/ W. P. FLOWER
W. P. Flower

/s/ CHARLES E. DIRCK
C. DIRCK
C. Dirck

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**Plaintiffs' Supplemental Answer to Interrogatory No. 1 of
Defendant City of Cleveland**

[Filed November 25, 1969]

1. EJA was incorporated in Delaware on May 21, 1964; its principal place of business is Port Columbus International Airport, Columbus, Ohio; it is engaged in the business of flying contract and charter flights. EJS was incorporated in Delaware on November 30, 1964; its principal place of business is the same as for EJA; and it is engaged in the business of owning, selling and leasing jet aircraft.

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**Motion of Defendants City of Cleveland and Phillip A. Schwenz
To Dismiss for Lack of Jurisdiction**

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Title omitted in printing]

[Filed January 22, 1970]

Now come The City of Cleveland and Phillip A. Schwenz, defendants herein, and move the Court for an order pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure dismissing this action for lack of jurisdiction of the subject matter on the ground that there is no issue as to any material fact relating to the jurisdiction of this Court and on the undisputed facts this action does not arise under the Constitution, laws or treaties of the United States, there is no diversity of citizenship since all parties to the action are citizens of the State of Ohio and the action does not lie within the admiralty or maritime jurisdiction of the Court.

Defendants request an oral hearing with respect to the foregoing motion.

[Signatures and Certificate of Service
Omitted in Printing]

**Motion of Defendant Howard E. Dicken To Dismiss for
Lack of Jurisdiction**

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Title omitted in printing]

[Filed February 17, 1970]

Sirs:

PLEASE TAKE NOTICE that pursuant to Rule 12(b) and Rule 12(h)(3) of the Federal Rules of Civil Procedure the undersigned will move this Court, on behalf of defendant H. E. Dicken, for an order dismissing the complaint herein as to said defendant on the ground that the complaint fails to state a claim upon which relief can be granted and that the court lacks jurisdiction of the subject matter, and for such other, further and different relief as to the court may seem just and proper.

[Signatures and Certificate of Service
Omitted in Printing]

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Excerpts From Deposition of Edward J. McAvoy

[Filed March 4, 1970]

By Mr. Bostwick:

[26] Q. Was there anything in particular that you—any particular reason you got out at the halfway point of runway 6L-2R? A. Yes, sir. I took some pictures of the runway at that time.

Q. Was there anything on the runway? A. Yes, sir. There were dead sea gulls.

[27] Q. Did you count the sea gulls at that time? A. Not as such, no, sir.

Q. During this 10 minutes you just took some photos at that point? A. Yes, sir.

Q. Can you approximate for us how many sea gulls you saw dead on the runway? A. No, sir. I didn't even attempt to approximate it. There was a man out there in a three-quarter ton truck, an open-back truck, who was in the process of picking up the birds.

Q. The birds were actually being picked up when you arrived? A. Yes, sir, they were in the process of clearing the runway.

Q. Do you know who he was? A. No, sir, just a City employee.

Q. Did you give any instructions that nothing should be touched on the runway until you could make some official investigation and photographs? A. No, sir. I had taken my photographs, and I requested this gentleman to give me as close a count as possible as to the number of birds he picked up.

Q. At that time that you were out there in the truck? A. Yes, sir.

Q. You instructed this man to not only pick them up, but count them? A. I had not instructed him to pick them up, sir. I instructed him to give me a count of the birds he

did pick up. He had been dispatched prior to my arrival to pick up the birds.

[31] Q. Did someone give you a bird count of these dead birds? A. Yes.

Mr. Crocker: I will object. This calls for hearsay information.

Mr. Bostwick: It has been noted for the record.

You can go ahead and answer.

The Witness: A. Yes, sir.

Q. And what was that?

Mr. Crocker: Objection. It calls for hearsay information.

Mr. Bostwick: It has been noted.

Go ahead and answer.

The Witness: A. 314.

[32] Q. Mr. McAvoy, handing you what the court reporter has marked here as Plaintiff's Exhibit No. 4 for identification, can you tell us what that is, please?

The Witness: A. That is a sketch of Burke Lakefront Airport with some notations made by myself.

[35] Q. All right, Plaintiff's Exhibit 16 for identification. A. Plaintiff's Exhibit 16 is a narrative statement dated July 29th, by Howard Dicken.

That would be number 46 in the lower lefthand corner.

This is representative of the statement in the package.

Q. I would like to ask about Plaintiff's Exhibit 16.

In the course of your aircraft accident investigation, did you ask for or receive any other narrative statements or signed statements by Howard E. Dicken, other than this Plaintiff's Exhibit 16 which you got on September 11th? A. No, sir.

Q. Plaintiff's Exhibit 17 is next. A. Plaintiff's Exhibit

17 is a narrative statement dated July 29th, by Paul Guinaugh.

[36] The penciled number 47 is in the lower lefthand corner.

This is representative of the one in the package received.

Q. I would just like to ask you whether in the course of your accident investigation you asked for or received any other statements from Mr. Guinaugh, other than Plaintiff's Exhibit 17? A. No, sir.

Q. Plaintiff's 18 is next. A. Plaintiff's Exhibit 18 is a narrative statement dated July 29, 1968, by Fernwood Markle.

The penciled number 48 is in the lower lefthand corner.

This is representative of the statement in the package.

Q. Did you ask for or receive any additional statement from Mr. Markle in your accident investigation? A. No, sir.

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[40] Q. On Plaintiff's 4, this chart of the airport that you have described and testified that you made the marks on, there is a spot that says "impact point" with an arrow drawn there. Did you make that mark and those words, "impact point"? A. Yes, sir.

Q. And it says "7,260 feet" to that point. Is that your marking? A. That is my measurement, yes, sir.

Q. Tell me what that number has reference to with regard to the impact point. A. That is the distance that I saw the buoy from the end of the runway.

Q. And how did you ascertain that the buoy was 7,260 feet from—well, which end of the runway? A. From the threshold of 6 left.

Q. The take-off end of 6 left; is that right? A. Yes, sir.

Q. How did you ascertain that fact? A. I had a City map of the area with measurements on it.

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[43] Q. Page three of your report has two boxes under "name of nearest airport, approximate distance, and compass heading." "Compass Heading" says "230."

Would that mean that a reciprocal back from the impact point to the airport would be a reciprocal of 050 or 230? A. Yes.

Q. And did you make this entry distance—it says "1/5 SM." What does that mean? A. The intent was to designate one-fifth of a statute mile.

Q. Was that your actual estimate there, one-fifth of a statute mile? A. Yes, sir.

Q. Can you describe for me what that measurement is from? It is from the impact point, I take it. But to where?

Mr. Crocker: I object to your keeping referring to the "impact point."

This witness has said time and time again he doesn't know what the impact point was.

Mr. Bostwick: I'm referring to the words on Plaintiff's 4, quote, impact point, close quote.

Mr. Crocker: I object to that reference on Exhibit 4. I don't think that is proper or admissible in this case.

Mr. Bostwick: Go ahead. Can you tell me what the one-[44] fifth of a statute mile is a measurement of, where it starts, and where it ends?

The Witness: A. This should designate the distance, direction, and closest airport boundary.

Q. Are the airport boundaries at Burke Lakefront depicted on Plaintiff's 4? A. Not clearly, no, sir.

Q. Are you able to tell us, for example, where the nearest airport boundary to what you marked as "EMA-9" is? Can you show us an airport boundary that is closest to "EMA-9"? A. Not on the Exhibit, no, sir.

Q. How did you ascertain the airport boundary for your measurement? A. By a cyclone fence.

Q. And how did you measure this one-fifth of a statute mile? A. Off the engineering map that I had access to.

Q. Was it gridded in some way for distance? A. It had

a running footage along the lakefront that I was able to arrive at a 7,260 foot figure.

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Q. Handing you what the court reporter has marked as Plaintiff's 37, Mr. McAvoy, can you identify that photograph for us, please?

The Witness: A. Yes, sir.

Q. What is it? A. This is the cyclone fence that marked the eastern edge of the airport proper.

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[45] Q. Does Plaintiff's 37, is that a fair representation of what you saw Sunday night when you viewed the cyclone fence on July 28th? A. Yes, sir.

• • • • •

[46] Q. In the course of your accident investigation did you attempt to ascertain the flight path of this aircraft from the time of take-off to the time of impact?

The Witness: A. Yes, sir.

Q. And what did you do to try to ascertain that fact? A. There were three objects I used as a reference point.

Q. What were they? A. One of the objects had been moved, so it was of no value.

There was a point on the runway, taxiway C. There was a fence that had been described as struck by the aircraft.

Q. Who did that describing? A. Initially, I first heard the statement from the tower personnel.

Q. Do you remember which one? A. No, sir.

Q. Or the persons? A. No, sir.

Q. When you say "tower personnel," is that the same group as those three Air Traffic Control Specialists that you referred to? A. Yes.

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[47] Q. Was this your method of determining the flight path of the aircraft prior to impact? A. Yes, sir.

Q. And is that depicted by this dotted line on Plaintiff's 4? A. Approximately, yes, sir.

Q. Does the dotted line on Plaintiff's 4, would it run through this broken part of the fence? A. Yes, sir.

.
[50] Q. Could you estimate the depth of the water at the "EMA-10"? That is on Plaintiff's 36. A. If I remember, skin divers who were in the salvage operation business estimated the depth of the water at—between 40 and 45 feet.

Mr. Crocker: I object to the answer, and ask that it be stricken as being hearsay.

Mr. Bostwick: Q. Were the skin divers working at this spot that you have marked as "EMA-10"?

The Witness: A. Yes.

Q. And what day was that? A. July 30th, sir.

Q. That would have been Tuesday after the accident on Sunday? A. Tuesday.

Q. To your knowledge was the aircraft moved at all during Monday, July 29th, from the spot you have marked at "EMA-10"? A. Not to my knowledge, no, sir.

.
[52] Q. Handing you what the reporter has marked as Plaintiff's Exhibit 42 for identification, I would like to ask you to identify that upper photograph in that document, please.

The Witness: A. This is a photograph I took.

Q. What is it a photograph of? A. It is a picture of a row of vehicles.

Q. Do you remember when you took it? A. No, sir.

Q. Do you think it might have been when you were out there Monday morning and took the pictures from the threshold shown on Exhibit 3? A. Perhaps.

Q. Do I understand that the location of that photograph is out there somewhere between the end of runway 6L and the water's edge? A. Between?

Q. Well, you described that as a row of vehicles. Can you tell us where that photograph was taken. A. It is in the area northeast of the departure end of runway 6 left.

Q. Does it fairly represent what you saw that morning with regard to those vehicles? A. Yes, sir.

Q. In that upper photo this truck that has the damage to it on the top, did you ascertain in the course of your accident investigation that that truck had been damaged by the aircraft that crashed there, N367EJ? A. It was reported to me that that is what occurred, yes, sir.

Q. What told you that; do you remember? A. No, sir.

Q. In the course of your accident investigation did you ascertain whether the position of the truck as we see it in the upper photo, Plaintiff's 42, is where the truck was located when it was struck by the airplane? A. Will you rephrase that?

Q. I will be glad to. In the course of your accident investigation did you learn whether the position of the truck as it is shown here in this upper photograph of Plaintiff's 42 is the same position that the truck was in at the time it was struck by the airplane? A. It was not reported in that position.

Q. What information was given to you about its position at the time it was struck by the airplane? A. It was reported that the truck was adjacent to the cyclone fence.

Q. And is there a place in this upper photograph of Exhibit 43 that you could point to to depict where the truck was at the time it was struck?

Mr. Crocker: Based on what someone else told him?

Mr. Bostwick: Yes.

The Witness: A. As reported to me, sir, it was directly easterly of the row of vehicles, in this position here (indicating).

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Q. Mark that "EMA-12." A. (Marking Exhibit.)

Q. That descriptive phrase below that upper photograph

on Plaintiff's 42, is that a phrase that you wrote? A. Yes, sir.

Q. Did the aircraft stay submerged in the water all day July 28th at this point that you have marked on Exhibit 36 as "EMA-10"? A. To the best of my knowledge, yes, sir.

Q. When did salvage operations start? A. Either the 30th or 31st, July.

Q. That would be either Tuesday or Wednesday? A. Yes, sir.

Q. Do you have any notes in your record that would indicate which of those two dates it was, that would refresh your memory on that? A. I have some newspaper photos with the date of July 30th showing the aircraft being lifted from the lake.

Q. July 30th is Tuesday; right? A. Yes, sir.

[58] Q. Would you describe for us the nature of your exterior inspection on the aircraft with regard to the damage of the aircraft? Can you describe for us what you saw when you observed the aircraft, insofar as the damage done to it? A. Yes, sir.

[59] Q. Will you go ahead with your answer?

The Witness: A. Examination of both engines, I recorded there was a dent in the nose cone position.

The guide veins were damaged to a slight degree.

Mr. Zimmermann: Again may I insist that you specify what it was that you observed, rather than using the term "damage."

Mr. Bostwick: I think that is what he did. He saw the guide veins damaged to a slight degree.

Mr. Zimmermann: Can he describe the slight degree of whatever he saw, whatever part of it he saw that was dented, bent, torn, or whatever?

Mr. Bostwick: Do you want to go ahead with your answer? Try to keep your voice up for the court reporter.

The Witness: In that lines were not in their normal configuration.

Q. What did you observe with regard to their abnormal configuration? A. They were bent.

Q. Tell us how they were bent, what you observed with regard to them being bent. A. The guide veins were bent to various angles.

Q. Were there any other observations with regard to the engines? A. The first stage compressor rotator blades were bent.

[60] Q. Were there any other observations with regard to the engines? You can go right ahead, if you like, with all of your observations that you have recorded either there, or that you remember. A. The first stage stator blades, and second stage rotor blades were bent and torn.

Q. Do you want me to say "go ahead" between each one? A. No, sir.

Q. I will be glad to.

Mr. Zimmermann: Off the record.

(Discussion off the record.)

The Witness: The compressor area of the jet engine was filled with bird debris. By visual examination of the engine I saw a percentage of the fan rotor secondary air files were missing. The blades that were not missing, that were present, were bent and ripped.

The exit guide veins leading edges had bends and tears.

Examination of the starboard engine, I saw three dents in the nose cone.

The guide vein was missing at the 2:00 o'clock position. The guide vein was wedged between the first stage rotor and first stage stator blades at the 5:00 o'clock position.

The first stage stator blades were damaged—were out of configuration because of their proximity to the first stage rotor blades.

All the visible compressor rotor blades that I saw had extensive bending and metal tearing.

In the forward area of this engine I saw bird debris.

In my aft view of the engine 75 per cent of the fan rotor secondary air files were missing. The remaining blades were bent and torn.

One exit guide vein was missing. The guide veins that were present were bent and torn.

Q. Aside from the engines, did you make any observations on the outside of the aircraft? A. Yes, sir.

Q. Would you describe those for us, please. A. All components of the aircraft were examined.

[61] Q. Could you describe what you saw with regard to those components? A. Both wings were not in their normal configuration.

Q. Can you describe the configuration they were in? A. The metal was dented and torn and displaced in many instances.

Q. What about the fuselage? A. The fuselage contained severe bending.

Q. Can you describe where the bending was? Would you point to it on one of those photographs, and mark it with a ballpoint? A. It is not clearly visible on this one photograph. There is just one evidence of cabin damage here.

Q. Do you want to mark that out, please? A. (Marking Exhibit.)

Q. Mark that "EMA-14." A. (Marking Exhibit.)

Q. Was there any other bending of the fuselage? A. Yes, sir.

Q. Will you point that out with another arrow? A. I can't see it on this photograph.

Q. Can you describe where it was? A. Approximately the mid-portion, mid-top portion of the cabin, and also on the underside of the fuselage.

Q. Are there any other observations with regard to the fuselage? A. (Inaudible.)

Q. I'm sorry, I didn't hear that. A. Pertaining to what, specifically?

Q. I don't want to lead you. I just wanted to know if there were any other observations with regard to the fuselage, other than what you have just stated? A. There was extensive damage—I'm sorry. After 200 reports where I have been using the word consistently, it is hard to eliminate it from my vocabulary.

Q. I don't think it needs to be eliminated. If you say you saw damage, describe what damage you saw.

Mr. Zimmermann: I'm instructing the witness to confine himself to what he actually observed.

The Witness: A. There was an extensive area at the root of the port wing that exposed the interior construction of the fuselage.

[62] Q. Is that portion of the root of the port wing shown in any of these photographs? A. Yes, sir.

Q. Could you put an arrow to that. A. (Marking Exhibit.) It is right here.

Q. That will be "EMA-15," I believe. A. (Marking Exhibit.)

Q. Do you want to continue with your observations? A. There was a similar area on the starboard side at the wing root trailing edge.

Q. Is that depicted in any of these photographs? A. Yes, sir.

Q. Would you put an arrow to that, please?

I guess we ought to note for the record that "EMA-15" was drawn on the lower photograph of Plaintiff's Exhibit No. 45. A. (Marking Exhibit.)

Q. You are now drawing on the photograph in Exhibit 44. Mark that "EMA-16." A. (Marking Exhibit.)

Q. Go ahead, please. A. Interior examination of the aircraft revealed intensive water soaking.

Q. Did you take a photograph of the interior? A. No, sir.

Q. Go ahead. A. I have about concluded my examination.

Q. What about the empennage at the tail section, did you make any observation with regard to that? A. Yes, sir.

Q. Could you describe those for us? A. I do not recall any visible markings on the exterior of the empennage area.

Q. Have we covered all of your observations at this time and place when you observed both the exterior and the interior of the aircraft? A. I would like to correct myself.

Q. Okay, go ahead. A. I noted some marks on the horizontal stabilizer, the elevators, and the vertical fins.

Q. Could you describe the marks? A. Metal dent-type marks.

Q. Are they shown in any of the photographs that we have here? A. No, sir, they are not visible.

Q. Is there anything else that you see in your report that refreshes your memory about your observations that day after they brought the aircraft out of the water? A. Say that again.

Q. Is there anything else there in your report that refreshes your memory about the observations you made of the aircraft after they brought it out of the water, other than what we have discussed? A. Aircraft systems.

Q. Could you describe what you observed with regard to the aircraft systems? A. The fuel system, as a result—I will correct that. The fuel system was not capable of normal operation because it was deformed by some external source.

Q. Can you just tell us how it was deformed? A. No, sir.

Q. Was it caved in, or ripped open, or any descriptive words that you have. A. It was severely bent.

Q. That is not shown in any of these photographs, is it? A. No, sir.

Q. Is there anything else with regard to the aircraft systems? A. All of the electrical wiring examined was water soaked. The hydraulic systems were bent and deformed. The anti-ice system, which is an electrical system, had external damage and was water soaked.

Q. When you say it was "damaged" was it torn open or bent? Can you describe it? A. Bent and distorted.

Q. Is there anything else with regard to the aircraft systems? A. No, sir.

Q. Are there any other major observations of the aircraft, inside or out? A. We observed that all of the seats of the aircraft were water soaked.

Q. Is that about it? A. Yes, sir.

Q. Was there ever a tear-down of either one or both of these jet engines, so far as your accident investigation was concerned? A. No, sir.

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By Mr. Crocker:

Q. Now you testified that you talked with Howard E. Dicken, who was a Watch Supervisor in the tower cab; is that true? A. Yes, sir.

Q. And you told us that you asked him if he had been on [64] duty at the time of the accident, and he told you that he had; is that right? A. Yes, sir.

Q. And you asked him about his observations of the accident; is that right? A. Yes, sir.

Q. He told you that the plane had taken off and had encountered a flock of birds; is that correct? A. Basically, yes.

Q. Did you ask Mr. Dicken whether or not he was the one who had issued the take-off clearance to this particular plane? A. This question was asked of Mr. Dicken, yes, sir.

Q. And he told you that he was the man that had done that? A. Yes, sir.

Q. And he also told you that he had warned the pilot about the presence of sea gulls on the runway; didn't he tell you that?

Mr. Bostwick: I object to the form.

The Witness: A. He stated the manner in which he issued the Advisory to the aircraft, yes, sir.

Mr. Crocker: Q. And what else did he tell you? A. He stated that he assumed control of the aircraft as the aircraft departed the ramp area. He was instructed to contact the air control portion of the tower.

Q. The pilot was instructed, you mean? A. By the ground control, prior to his crossing 6 left—6 right. When the

pilot arrived at 6 right, he switched frequency and contacted the air control portion in the tower cab.

Q. Which portion was Mr. Dicken operating; did he tell you that? A. Yes, sir.

Q. Which? A. He designated it as local control. To clarify, it was the airborne portion of the control.

Q. Didn't Mr. Dicken tell you that the pilot had been told, before he commenced his take-off, that there were sea gulls on the runway, and that there was a million of them there?

Mr. Bostwick: I object to the form.

The Witness: A. Mr. Dicken stated that he issued this bird Advisory.

[65] Mr. Crocker: Q. What did he say he told the pilot? A. He told me that he advised the pilot that he was cleared for a take-off, there were birds on the runway, and he stated that he added the phrase "there are millions of them."

Q. "There are a million of them"? A. "Millions."

Q. "Millions" plural of them? A. Plural.

Q. Did he tell you whether he had an acknowledgement of that clearance from the pilot? A. It was not discussed as such, no, sir.

Q. You didn't ask him that? A. Mr. Dicken stated that he re-issued that take-off instruction to the aircraft when requested to do so by the pilot.

Q. I say, did you ask Mr. Dicken whether or not he had received an acknowledgement of this Advisory that he gave the pilot? A. I questioned Mr. Dicken if the pilot had acknowledged the receipt of the bird Advisory.

Q. And what did he say? A. He said "No."

Q. He said the pilot had not acknowledged it? A. He said the pilot had recommunicated with him after the Advisory was issued, and he requested clarification of take-off instructions.

Q. And what did he do then? A. He re-issued take-off instructions to the pilot.

Q. With the bird Advisory? A. Not with the bird Advisory, no, sir.

Q. Not with the bird Advisory? Is that what Mr. Dicken told you? A. Yes, sir.

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[66] Q. Now what did these two men, other than Mr. Dicken, who were in the tower cab at the time of the accident, what did they tell you about the clearance that was issued to the pilot, what instructions were issued to him? A. I recall speaking to one other person in the tower who stated that he had communicated with the aircraft.

Q. Who was that? A. I believe that was Mister—I will not quote the name, sir. It is the man who initially issued taxi instructions to the aircraft after engine start.

Q. You are not sure of his name? A. I'm not sure, no, sir.

Q. And what did he say he had said to the pilot, and what the pilot said to him? A. He said when he was contacted by the aircraft, he issued taxi instructions to the aircraft for take-off, to take-off position.

Q. Now did you question these other two men who had been in the tower cab at the time of the take-off, other than Dicken, as to whether they had overheard the communication Dicken had with the pilot? Did you question them about that? A. That was discussed, yes, sir.

Q. And what did they tell you about that? A. I cannot say that, sir, because one of the other men was not present at the time of the accident. He was coming on duty at that time.

Q. Well, what did the men that were in the tower cab at the time of the accident, what did they tell you that [67] they had overheard in the way of communications between Mr. Dicken and the pilot? A. One of the men I questioned stated that he heard Mr. Dicken issue take-off instructions and bird Advisory to the aircraft.

Q. And did he confirm that Mr. Dicken, in addition to telling the pilots that there were birds on the runway, had added the phrase "there are millions of them?" Did he confirm that? A. I would have to refresh my memory.

Q. Well, refresh your recollection. A. Yes, sir.

Q. What did he say? A. The gentleman I spoke to confirmed that he heard Mr. Dicken use the terminology "millions."

Q. But was that Mr. Fernwood Markle? A. I don't know, sir. He did not have a nameplate on him, and I was—

Q. Well, would you look at Plaintiff's Exhibit 18 for identification, which is page number 48, and tell us whether or not that refreshes your collection that Mr. Markle told you when you talked with him that he overheard Mr. Dicken advise the pilot of this Falcon aircraft that there were gulls on the runway, and he added the phrase, quote, "It looks like there are a million of them," close quote. Does that refresh your recollection? A. Perhaps I wasn't clear. There were only two personnel in the tower when I questioned these people about the conditions that existed at the time of take-off. The other person who was there at the time was not present at the time of my questioning.

Q. Did you ever talk to this third person who wasn't present? A. Yes, sir.

Q. And when did you talk to him? A. At a later date.

Q. And who was that; do you know? A. I got statements from all three persons at a later date.

Q. I appreciate that. They are the statements that have been marked here as Plaintiff's Exhibits 16, 17, and 18. That is true, isn't it? A. Yes, sir.

Q. But what I'm trying to find out about now is when you talked first to the people in the tower there were only two men there who had been there at the time of the accident? A. That's correct.

[68] Q. One of them was Dicken. A. Yes, sir.

Q. And who was the other one? A. I don't know, sir.

Q. Well, it would have to have been either Markle or Guinaugh; is that right? A. Yes, sir.

Q. And the third one then you talked to at a later date? A. That's correct.

Q. When you talked with Mr. Markle then either in the tower, or at a later date, did he confirm the fact that he had overheard Mr. Dicken advise the pilot of this Falcon aircraft that there were sea gulls on the runway, and that he added the phrase, "it looks like there are a million of them"? A. I don't—he did not ever use the words "sea gulls on the runway," sir. I think the terminology was "birds."

Q. Well then, did he confirm the fact that he had overheard Mr. Dicken warn the pilot about birds on the runway? A. Yes, sir.

Q. And that he had overheard Mr. Dicken add the phrase, "it looks like there are a million of them"? A. Yes, sir.

Q. Now what about Mr. Guinaugh, when you talked with him either in the tower, if you talked with him in the tower, or later, whenever it was that you talked with him, did he confirm that he had overheard the same discussion between Mr. Dicken and the pilot? A. Yes, sir.

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Q. You told us about the aircraft being raised out of the water by this floating derrick, I guess you might call it, and being dropped back in. Was that dropped intentionally, or was it done inadvertently? A. Inadvertently.

Q. Inadvertently? And you aren't able to tell us the reason why it dropped back? In other words did the sling break, or the boom collapse? What did you see happen? A. I saw the attaching line release, and the aircraft drop back in.

Q. What do you mean? Was there some sort of a sling that went around the fuselage? A. They had either a sling around the fuselage and discarded that and used the [69] attach points, or they were using the attach points, and discarded that and used the sling.

Q. But was it the sling that went around that you think that broke that caused the plane to drop back in? A. There was no sling on the aircraft when it dropped in, sir.

Q. Were they using the attach points? A. The lift attach points.

Q. Did the attach points break, or was it part of the rigging that broke? A. The thing that they had put on the hoist. This is a lift-type device for the Falcon aircraft was put on—the failure occurred in the lifting device.

Q. There is a special rig of some sort that is used to lift the aircraft? A. Yes, sir.

Q. And that it was attached to the attach points on the aircraft, and the rigging from the derrick was attached to that piece? A. Yes, sir.

Q. And it was this particular rig or fixture, the lift fixture, if we can call it that, that broke? A. Yes, sir.

Q. Who supplied that; do you know? A. If I recall correctly, it was the Falcon people.

Q. The people from the Falcon Company that were there? A. Yes, sir.

Q. And after that broke, then there was a different method used to rig the derrick to the plane to lift it out of the water; is that true? A. If I recall correctly, then they used the wrap-around sling on the aircraft to lift it.

Q. And did you observe what, if any, deformation, bending, or tearing was done to the airplane by that wrap-around sling that they used? A. I saw crinkling in the cabin fuselage in the sling area.

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**Plaintiffs' Exhibit 16 Marked for Identification in
McAvoy Deposition**

**AIR TRAFFIC CONTROL TOWER
BURKE LAKEFRONT AIRPORT
CLEVELAND, OHIO 44114**

July 29, 1968

NARRATIVE STATEMENT

The following is a report concerning the accident to aircraft FFJ-N367EJ at Cleveland, Ohio, Burke Lakefront Airport, July 28, 1968, at 1543 GMT.

My name is Howard E. Dicken, my address is 23225-Cedar Point Road, Cleveland, Ohio 44142. I am employed as an Air Traffic Control Specialist by Federal Aviation Administration at Burke Lakefront Tower, Cleveland, Ohio.

During the period 1100 GMT to 1900 GMT, I was Watch Supervisor. At the time of the accident, I was working local control position.

FFJ-N367EJ was holding short of runway 6R. Pilot requested take off instruction. I cleared N367EJ to cross 6R, without delay. Traffic PA-24-N4723L, one mile on final for runway 6R. N367EJ crossed 6R and was cleared for take off on six left. I advised the pilot of numerous seagulls on the runway. Then I added, "It looks like a million of them." N367EJ started take off becoming airborne approximately 3000 feet from approach end of runway 6L. At about this time the seagulls started to rise in front of the aircraft. The aircraft was approximately 100 feet in the air when it hit the seagulls. I saw the engines smoking, and the aircraft began to settle back to the runway. At this time the aircraft made a slight left turn ending up in the water about 200 feet off short.

/s/ Howard E. Dicken
HOWARD E. DICKEN
Burke Lakefront Tower
Cleveland, Ohio

**Plaintiffs' Exhibit 17 Marked for Identification in
McAvoy Deposition**

**AIR TRAFFIC CONTROL TOWER
BURKE LAKEFRONT AIRPORT
CLEVELAND, OHIO 44114**

July 29, 1968

NARRATIVE STATEMENT

The following is a report concerning the accident to aircraft FFJ-N367EJ at Cleveland, Ohio, Burke Lakefront Airport, July 28, 1968, at 1543 GMT.

My name is Paul L. Guinaugh, my address is 20400 Albion Road, Strongsville, Ohio. I am employed as an Air Traffic Control Specialist by Federal Aviation Administration at Burke Lakefront Tower, Cleveland, Ohio.

During the period 1100 GMT and 1400 GMT, while working Local Control position, I requested City Operations to conduct a check of an unusually large flock of seagulls observed in the vicinity of Runway 6L/24R. City Agent William Pfarr completed an inspection of the area and inquired if I thought a NOTAM should be sent in connection with the seagull activity—I replied that a NOTAM should be sent. As a result, an Airman Advisory (AIRAD) was forwarded to the Cleveland FSS regarding "numerous seagulls in the vicinity of runway 6L/24R" effective 1313 GMT.

At approximately 1535 GMT, while working Ground Control, N367EJ-FFJ requested taxi clearance for take off. I cleared N367EJ-FFJ to Runway 6 and instructed the aircraft to hold short of Runway 6R and to contact the tower on 120.9 MHE when ready for take off.

After hearing local Control advise the jet that there were a million seagulls on the runway, I observed N367EJ-FFJ taking off and striking a flock of birds shortly after the aircraft became airborne. I saw smoke trailing from

the aircraft as it veered left toward the water coming to a stop about 200 feet to the left side of the runway.

/s/ Paul L. Guinaugh
PAUL L. GUINAUGH
Burke Lakefront Tower
Cleveland, Ohio

**Plaintiffs' Exhibit 18 Marked for Identification in
McAvoy Deposition**

AIR TRAFFIC CONTROL TOWER
BURKE LAKEFRONT AIRPORT
CLEVELAND, OHIO 44114

July 29, 1968

NARRATIVE STATEMENT

The following is a report concerning the accident to aircraft FFJ-N367EJ at Cleveland, Ohio, Burke Lakefront Airport, July 28, 1968, at 1543 GMT.

My name is Fernwood Marke, my address is 34099 Detroit Road, Avon, Ohio. I am employed as an Air Traffic Control Specialist by Federal Aviation Administration at Burke Lakefront Tower, Cleveland, Ohio.

While working Flight Data, I heard the local controller clear FFJ-N367EJ for take off on runway 6L. He advised the pilot of the aircraft that there were seagulls on the runway, then he added "It looks like there are a million of them." I observed the aircraft starting its take off roll and striking numerous seagulls rising from the runway as the aircraft became airborne. I observed smoke trailing from the aircraft engines. The aircraft veered to the left and headed for the water and came to rest in the water about 200 feet off shore.

/s/ Fernwood Markle
FERNWOOD MARKLE
Burke Lakefront Tower
Cleveland, Ohio

**Opinion of the United States Court of Appeals
for the Sixth Circuit**

[Filed August 24, 1971]

Printed in Petition for Certiorari, Appendix A, pp. 1a-26a.

**Opinion of the United States District Court for the Northern
District of Ohio, Eastern Division**

[Filed June 12, 1970]

Printed in Petition for Certiorari, Appendix B, pp. 27a-42a.

Supreme Court of the United States

No. 71-678 ~~Excluded from review~~

Executive Jet Aviation, Inc., et al.,

Petitioners,

v.

City of Cleveland, Ohio, et al.

ORDER ALLOWING CERTIORARI. Filed February 22 -----, 1972.

The petition herein for a writ of certiorari to the United States Court of
appeals for the **Sixth -----** Circuit is granted.